CONTRACTS OF ATTORNEYS AT LAW WITH CLIENTS.

THE subject of contracts between attorney and client has been before the Courts of New York for some years past. A recent decision in the Court of Appeals may now be considered to settle substantially all the questions likely to be raised in the ordinary routine of the lawyer's office.

The Courts have held lawyers dealing with their clients to a stricter rule than ordinarily obtains in other contractual relations.

In the first place, it is held that notwithstanding an express clear and firm contract has been made between them, the client may at any time dismiss his attorney whether with reason or without reason. The judicial point of view and the legal consequences, however, seem to vary according to the period reached in the relations between counsel and client, when the agreement was made. The immunity of the contract when made before employment is greater than when made after employment.

Thus the Courts hold that in the beginning of the relation and before the employment is actually concluded the client is at arm's length with the attorney and is in a position to take care of himself. So that he is held to the contract which then establishes the relation of attorney and client. On the other hand, the Courts presume that, when such agreements are made after the relation has subsisted, the client is under the influence of the confidence that he has in his counsel, and is, therefore, more easily beguiled into making an improvident arrangement by reason of that confidence. And thus, it is concluded that the contract in the first instance ought to be placed upon much the same basis as contracts between laymen. The attorney in such case is protected in his agreement as is a layman. By reason of the trust and dependence of the client on the lawyer after the relation has been established, the presumption seems to be, rather against the fairness of the contract than in favor of it,

so that the burden is upon the attorney in such case, to show that he has taken no undue advantage of his client and that the terms made are fair and reasonable in every respect.

Thus, in a case last summer by the Appellate Division of the Supreme Court of the State of New York, in the Second Department the Court [1] reiterated the rule that contracts between an attorney and his client, which are favorable to the attorney, and are made during the relationship between the parties, stand upon a different basis from ordinary contracts between persons who deal at arm's length. The Court called attention to the effect of the special provision of the New York Judiciary Law which states that the compensation of an attorney is governed by agreement expressed or implied which is not restrained by law, and held that this provision applies only to contracts that are made before the services are entered into and not to those made during the relationship of attorney and client. The general rule is stated to be that as to contracts between the attorney and client subsequent to the employment which are beneficial to the attorney, it is encumbent upon the attorney to show that the provisions are fair and reasonable and were fully known and understood by the client.

The Courts declare the rule to be a just one imposing no unreasonable burden upon the attorney. The reason for the rule is stated to be that the relations between attorney and client are so confidential and the client relies so fully upon his attorney for the protection of his legal rights, that in all such contracts the attorney cannot rest upon the face of the agreement itself, but is compelled by the law to show in addition thereto that the contract is fair and reasonable and that the client was fully informed of all the facts which enabled him to judge of its fairness and reasonableness.

While it is held that a contract for professional employment may be made in New York between an attorney and client on such terms as they may agree, it is nevertheless held that such contracts must be fairly made. An attorney cannot use his position to obtain for himself an unconscionable advantage.

[1] Cooper *v.* Conklin, 197 App. Div. 205.

No contract, express or implied, will be enforced if it be contrary to public policy, and agreements between attorney and client, unless shown by the attorney to be unobjectionable, are within the class which will not be enforced.

There is engrafted upon these principles a further limitation, already referred to, that notwithstanding the contract between him and his client, the attorney may be dismissed at any time by the client, with reason or without reason, and the only remedy of the attorney is an action to recover for the value of his services to the time of the discharge. This rule applies where the agreement provides either for contingent or for absolute compensation for the services of the attorney.

Notwithstanding these decisions, it has been for some time a question with the Bar whether a contract, which provides for an annual retainer payable periodically, could be broken by the client without the right of recovery to the attorney for the unexpired term, at the rate established in the contract. This question, coming before the Trial Term of the Supreme Court, and the Appellate Division, an intermediate court of appeals, was decided adversely to the attorney on the general principle that the law read into contracts between attorney and client an implied provision for the cancellation of it by the client, without other liability than a *quantum meruit*. The Court of Appeals, however, has decided [2] that in a contract for an annual retainer the reason for reading into it an implied provision for permitting the cancellation of the contract, without liability for compensation for the unexpired time, does not exist. The Court is of opinion that a contract for an annual retainer, though providing for professional advice and service, is more in the nature of an ordinary contract between master and servant than one for professional employment. The Court, therefore, holds that such a contract does not differ from contracts with other salaried employees, except in the character of the work to be performed.

In Massachusetts it has been held that where an attorney was employed by a bank for a fixed period, he could recover damages in case of a breach of the contract. In New York it was

[2] Greenburg *v.* Remick, 230 New York 70.

held in a recent case, that a village was liable for his salary for the unexpired time, under a contract with an attorney for the period agreed on.

The measure of damages in such a case is held to be, not a *quantum meruit,* to the time of the breach of the contract, but the whole amount of compensation unpaid to the end of the fixed period.

Recapitulating, this class of agreements is divided into three kinds:

First: When the agreement is made before the confidential relation actually exists. Here the presumption against the contract does not exist and the rights of the attorney for a breach are protected as if the agreement were between laymen.

Second: When the agreement is made after the confidential relation has arisen. Here the presumption is against the fairness of the contract to the extent of requiring the attorney to prove it to be reasonable.

Third: When the agreement is made for compensation for a fixed period, no discrimination is made against it.

All of these agreements are subject to the client's absolute right to dismiss his attorney at any time. But the rule of damages in the two first cases varies from that in the last case.

In the former the attorney can recover on a *quantum meruit* only up to the time of the dismissal; in the last case he can recover the entire amount unpaid for the period fixed at the rate specified in the contract.

The reasons given by the Courts for the discrimination against the attorney are not wholly satisfactory.

We do not see why the Court which professes to hold members of the Bar in high esteem and to honor them by calling them officers of the Court, should on learning that one of them has made an agreement for his services, forthwith presume he has acted unfairly, and require him to prove the contrary. It is a cardinal and ancient rule of construction that men are honest and especially that wrong doing is not imputed to officers of the law, without proof.

The reasons given for excepting members of an honored and

learned profession from such presumptions are not applied in other instances of confidential relations, and the discrimination against the lawyer seems unnecessarily severe and reflects both upon his judgment and upon his integrity.

Nor does there seem to be sufficient ground for distinguishing between agreements made before and those made after the relation of attorney and client is established. For confidence and trust precede the relation as well as exist afterwards, and are in many instances greater before than after the agreement.

Nor does it seem logical, when the time comes for giving the lawyer the benefit of his contract, to distinguish between a contract for a fixed period and one for an unfixed period. In either case the rule of damages should apparently be the same as that established in agreements between laymen for personal services.

However, the law in New York is settled the other way, and there seems to be no hope that it will be changed.

Howard R. Bayne.

NEW YORK.